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Landmark Towne Center, LLC; Aglos, LLC; Dinky, LLC and; GF Liberty, LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NICOLE MOSS, an individual; and
DISABILITY RIGHTS, ENFORCEMENT,
EDUCATION, SERVICES: HELPING
YOU HELP OTHERS, a California public
benefit corporation

Plaintiffs,

vs.

MANILA BAY CUISINE; LANDMARK
TOWNE CENTER, LLC, a Delaware
limited liability company; AGLOS, LLC, a
Delaware limited liability company;
DINKY, LLC, a Delaware limited liability
company; GF LIBERTY, LLC, a Delaware
limited liability company; CRIMSUN,
INC., a California corporation,

Defendants.

CASE NO. C06-6356 SBA

DEFENDANTS MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO PLAINTIFFS'
MOTION TO ALTER OR AMEND
JUDGMENT; AND DECLARATION OF
JESSICA GRANNIS

I.
INTRODUCTION

Plaintiffs Nicole Moss (“Moss”) and the Disability Rights, Enforcement, Education, Services: Helping You Help Others (“DREES”) (hereinafter collectively referred to as “plaintiffs”) motion to vacate the Court’s Order Dismissing the Case on September 13, 2007 should be denied.

On or around October 11, 2006, plaintiffs filed a complaint against restaurant Manila Bay Cuisine (“Manila”) and their landlord Landmark Towne Center, LLC; Aglos, LLC; Dinky, LLC; and GF Liberty, LLC’s (hereinafter collectively “defendants”) for violations of the American with Disabilities Act associated with the restaurants restroom facilities.¹ After filing their complaint, however, plaintiffs took absolutely no efforts to prosecute their lawsuit. Despite repeated attempts by defendants to contact plaintiffs’ counsel (Grannis Decl., Exhibit A), plaintiffs failed to meet any of the deadlines set by the Court in its scheduling order of October 11, 2006 (the “Scheduling Order”).

On or about July 16, 2007, this Court duly served notice on all parties of the Court’s Hearing on its Order to Show Cause (“OSC”) to plaintiffs. Not only did plaintiffs fail to respond to the Court’s OSC, plaintiffs’ counsel also failed to appear at the hearing, without excuse. Plaintiffs’ counsel seeks to have the Court vacate its dismissal claiming that they did not receive the Court’s OSC notice, which even if true, does not excuse the fact that plaintiffs’ counsel failed to meet any of the Scheduling Order deadlines and, for almost a year, took no action to prosecute this lawsuit to the prejudice of defendants.

¹ The tenant Manila has already completed the required repairs to the restroom and provided evidence of these repairs to plaintiffs in or around May 2007. (Grannis Decl., Ex. B).

III.
LEGAL ANALYSIS

A. PLAINTIFFS' MOTION SHOULD BE DENIED BECAUSE PLAINTIFFS HAVE UNREASONABLY DELAYED IN PROSECUTING THIS ACTION TO THE PREJUDICE OF DEFENDANTS

Federal Rule of Court Rule 41(b) specifically provides that the failure of the plaintiff to prosecute its claim is grounds for involuntary dismissal of the action. Anderson v. Airwest, Inc. (9th Cir. 1976) 542 F.2d 522, 524. Rule 41(b) requires plaintiffs to prosecute their case with "reasonable diligence," and federal courts have inherent power to dismiss a complaint for delay in prosecution "to achieve the orderly and expeditious disposition of cases." Id; Link v. Wabash Railroad Co. (1962) 370 U.S. 626, 630-632. Dismissal is an appropriate sanction where warning has been provided to plaintiffs and where there is risk of prejudice to defendant from plaintiffs' delay. Oliva v. Sullivan (9th Cir. 1992) 958 F.2d 272, 273.

1. Plaintiffs' Were Provided Adequate Notice of the Court's Order to Show Cause

Plaintiffs' counsel had adequate warning of the risk of dismissal. The Court's notice of its Order to Show Cause was duly electronically served by the Court on July 16, 2007, and plaintiffs' failed to respond to the Court's order or to appear at the hearing on September 12, 2007.

This Court set this matter for electronic filing pursuant to Local Rule 5-4 and General Order 45. Under General Order 45, notices served electronically, consistent with the procedures adopted by the court, constitute service on the receiving party. General Order 45(VI)(C) & (IX)(A). General Order 45 specifically provides that "Orders filed by the court in cases designated for electronic filing will be served only via the email Notice of Electronic Filing. No paper service will be made by the court." General Order 45(IX)(D). General Order 45 further provides in pertinent part:

Parties in cases subject to ECF shall make available electronic mail addresses for service. Upon the filing of a document by a party, an e-mail message will be automatically generated by the electronic filing system and sent to all parties in the case. Receipt of this message shall constitute service on the receiving party. In addition to receiving e-mail notifications

of filing activity, the parties are strongly encouraged to check the docket in their case on the electronic filing system at regular intervals.

General Order 45(IX)(A).

Here, notice of the Court's OSC was duly served on all counsel by electronic filing. Additionally, the Court's docket and all electronically filed documents are easily available for review on the Court's website. Plaintiffs' counsel has a responsibility to manage their cases with reasonable diligence, including maintaining an ECF Account with the Court and checking the Court's docket at regular intervals. Plaintiffs have failed to provide a non-frivolous excuse for their failure to do so and should not be permitted to circumvent the Court's clear order by claiming that the "Order to Show Cause Notice of July 16, 2007, was not in the case file, and it appears that counsel never received said Notice." (Decl. Martinez at ¶ 10).

2. Plaintiffs' Have Failed to Prosecute the Action with Reasonable Diligence and Failed to Provide a Non-Frivolous Excuse for Their Delay

The law is clear that dismissal is warranted where there is a pattern of intentional and repeated delay and where plaintiff does not provide a "non-frivolous explanation for the delay." Laurino v. Syringa General Hospital (9th Cir. 2002) 279 F.3d 750, 753; see also Link v. Wabash 370 U.S. 626, 633 (plaintiffs case dismissed where plaintiff failed to appear for pretrial conference and failed to complete discovery by court ordered deadlines).

Here, plaintiffs' motion and supporting declaration fails to account for plaintiffs' eleven month delay, where plaintiffs took no action to prosecute this lawsuit and failed even to respond to defendants' counsels' repeated phone calls and letters. (Grannis Decl. Exh. A). On October 11, 2006, this Court issued its Scheduling Order requiring plaintiffs to complete a joint inspection on or before January 19, 2007, meet and confer regarding the joint inspection on or before January 29, 2007, file a Notice of Need for Mediation on or before February 2, 2007 and file a Motion for Administrative Relief Requesting Case Management Conference on or before February 9, 2007. Only after defendants threatened to bring a motion to dismiss based upon plaintiffs' failure to prosecute the action (Grannis Decl., Exhibit A), did plaintiffs'

1 schedule the required joint inspection on May 23, 2007, long after the January 19, 2007
 2 deadline had already passed. After the joint inspection, plaintiffs' counsel, again, left this
 3 matter to linger by failing to pursue settlement negotiations and failing to meet any of the other
 4 Scheduling Order deadlines, without substantial justification. (Martinez Decl. ¶¶ 8,9).

5 Plaintiffs' motion fails to provide any excuse for their dilatory conduct. This is a
 6 simple case involving minor repairs to a bathroom, repairs that have already been completed
 7 by the restaurant owner. (Grannis Decl., Exhibit B). Despite repeated attempts by defendants'
 8 counsel to move this case forward, plaintiffs' counsel repeatedly failed to return phone calls,
 9 failed to meet Court mandated deadlines and failed to respond to the Court's OSC. Now,
 10 plaintiffs' counsel, in an attempt to shift blame to a legal assistant, submits the declaration of
 11 Maria Martinez blaming internal miscommunications and preparations for a trial in September
 12 2007 for plaintiffs failure to prosecute a lawsuit that has been pending since October 2006.
 13 (Decl. Martinez ¶¶ 5-9). Ms. Martinez's declaration, however, shows that plaintiffs were
 14 negligent in their failure to prosecute this action and, thus, fails to meet the "non-frivolous"
 15 standard to justify plaintiffs' unreasonable one-year delay. Therefore, the Court's dismissal
 16 should stand.

17 3. Plaintiffs' Delay Has Caused Prejudice to Defendants

18 Moreover, dismissal is also warranted because plaintiffs' delay has caused prejudice to
 19 defendants. Morris v. Morgan Stanley & Co. (9th Cir. 1991) 942 F.2d 648, 651 ("the failure to
 20 prosecute diligently is sufficient itself to justify a dismissal *even in the absence* of a showing
 21 of actual prejudice to the defendant from the failure"). From the outset, defendants made
 22 efforts to resolve this matter expeditiously. Defendant Manila quickly made the necessary
 23 repairs to the premises, provided plaintiffs' counsel with invoices for these repairs and made
 24 the premises available for inspection. (Grannis Decl., Exhibit B). However, plaintiffs counsel
 25 refused to return phone calls, failed to provide any demand for settlement and failed to in
 26 anyway prosecute the lawsuit they filed against defendants. (Grannis Decl., Exhibit A). As a
 27 result of plaintiffs delay, defendants have been prejudiced in that they have been forced to
 28

1 incur unnecessary legal expenses to defend against plaintiffs' languishing action, including
2 repeated attempts to contact plaintiffs counsel, appearing at the September 12, 2007 OSC
3 hearing and opposing this motion. Forcing defendants' to incur additional attorneys fees, in a
4 case where there are no damages because the premises have already been repaired (Grannis
5 Decl., Exhibit B), is a severe prejudice to defendants, in light of plaintiffs' dilatory conduct.
6 Furthermore, defendants are likely to be prejudiced by the fact that necessary witnesses and
7 evidence may no longer be available, including, plaintiff Nicole Moss and employees of
8 Manila Bay Cuisine. (Grannis Decl., ¶ 5).

9 In the unlikely event that the Court is inclined to grant plaintiffs' relief, defendants
10 respectfully request that any reversal or amendment of the Court's dismissal of this action be
11 conditioned upon plaintiffs' payment of the attorney's fees incurred by defendants as a result
12 of plaintiffs' unreasonable and unjustified delay. 42 U.S.C. § 12188.

13 14 **III.** **CONCLUSION**

15 Based on the foregoing, defendants respectfully requests that this Court deny plaintiffs'
16 motion to vacate or amend the Court's September 12, 2007 Order dismissing plaintiffs'
17 complaint. Plaintiffs' failed to prosecute this action with reasonable diligence and failed to
18 provide a non-frivolous excuse for their repeated delays since October 2006. Furthermore,
19 defendants have been prejudice by plaintiffs' delay in that defendants have been forced to incur
20 unnecessary legal fees defending against plaintiffs' lawsuit despite the fact that the necessary
21 repairs to the premises have already been made. In the unlikely event that the Court is
22 inclined to grant plaintiffs' relief, defendants' respectfully request that the Court condition its
23 order on plaintiffs' payment of defendants' attorneys' fees incurred as a result of plaintiffs'
24 unreasonable delay.

1 Dated: November __, 2007

STEYER LOWENTHAL BOODROOKAS
ALVAREZ & SMITH LLP

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3 By: /s/ Jessica Grannis
4 Jeffrey H. Lowenthal
5 Edward Egan Smith
6 Jessica C. Grannis
7 Attorneys for Defendant Attorneys for
8 Defendants Landmark Towne Center,
9 LLC; Aglos, LLC; Dinky, LLC and; GF
10 Liberty, LLC
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DECLARATION OF JESSICA GRANNIS

I, Jessica Grannis, hereby declare as follows:

1. I am an attorney duly admitted to practice before the courts of this state and an associate of the law firm Steyer Lowenthal Boodrookas Alvarez & Smith LLP, attorneys for defendants Landmark Towne Center, LLC; Aglos, LLC; Dinky, LLC; and GF Liberty, LLC (collectively "Defendants") in this action. I am familiar with the pleadings and correspondence between the parties and have personal knowledge of all of the facts set forth herein. If called as a witness, I could and would competently testify thereto. I make this declaration in support of defendants' opposition to plaintiffs' motion to vacate or amend the Court's September 12, 2007 Judgment dismissing this action.

2. Attached hereto as Exhibit A is a true and correct copy of my letter date January 24, 2007 to plaintiffs' counsel.

3. Defendant Manila Bay Cuisine leases the subject premises located at 1230 El Camino Real, #J, San Bruno, California (the "Premises") from Defendants.

4. Attached hereto as Exhibit B is a true and correct copy of a fax from defendant Manila Bay Cuisine's counsel dated May 22, 2007 sent to plaintiffs' counsel and attached invoices regarding repairs made to the premises by defendant Manila Bay Cuisine. Manila Bay Cuisine's counsel has represented to me that they have made the necessary repairs to the Premises, such that the Premises are fully compliant with the Americans with Disabilities Act Access Guidelines and Title 24 of the California Code of Regulations

5. As a result of defendant Manila Bay Cuisine's above-referenced repairs, plaintiffs' claims for injunctive relief are moot and plaintiffs' can assert no claim for damages in this matter.

6. Defendants have been prejudiced by plaintiffs' delay in prosecuting this action, in that defendant's counsel has been forced to incur unnecessary legal expenses in trying to contact plaintiffs' counsel and responding to this motion. Defendants are likely to be further

1 prejudiced by plaintiffs' one-year delay, in that necessary witnesses and evidence may no
2 longer be available, including, plaintiff Nicole Moss and employees of Manila Bay Cuisine.

3 I declare under penalty of perjury under the laws of the State of California that the
4 foregoing is true and correct and that this Declaration was executed on November 21, 2007, at
5 San Francisco, California.

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7 /s/ Jessica Grannis
8 Jessica Grannis
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